In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 36.

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
COLUMBUS J. ESLIN, ADMINISTRATOR OF Daniel J. Connolly, deceased;
and
THE DISTRICT OF COLUMBIA, APPELLANT,
v.
SAMUEL J. RITCHIE;
and
THE DISTRICT OF COLUMBIA, APPELLANT,
v.
HARRIET P. GALT, ADMINISTRATRIX OF William M. Galt;
and
WILLIAM A. GORDON AND HOLDSWORTH Gordon, executors of Osceola C. Green, surviving partner of Downman & Green.

REPLY BRIEF FOR THE UNITED STATES.

ARGUMENT.

It is stated in the brief filed herein by Eslin, administrator of Connolly (p. 8):

> After the passage of the latter act (the act repealing the act of February 13, 1895), a

> motion for new trial came on to be heard before the Court of Claims, who, after hearing the same, on the 15th of January, 1900, overruled the motion.
>
> By this action the judgments rendered June 22, 1896, were in effect held to be good and valid judgments against the District of Columbia under the act of June 16, 1880 (21 Stat. L., 284), which originally conferred jurisdiction of this class of cases upon the Court of Claims.

In the brief for Galt it is stated (p. 6):

> On the 15th of January, 1900, the court entered an order overruling the motion for new trial (p. 68). In view of its order that no proceedings should be had on motions for new trial, this was equivalent to a decision that the judgments were not entered under that act but under the act of June 16, 1880.

This is the contention of all the claimants; and was urged in argument in the Court of Claims. But that court overruled the motion, without opinion, and afterwards allowed the appeal.

The judgment of June 22, 1896, recites: "The court, upon due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said (naming the several claimants) have and recover (naming the several amounts), amounting in all to the sum of thirteen thousand four hundred and fifty-eight dollars and thirty-three cents, upon debts of the District of Columbia, due and payable February 1, 1876, *within the intent and meaning of the act of February 13, 1895.*" (Tr., p. 66.)

These latter words of the judgment, though rather ambiguous, are clear when referred to the findings of the court and the conclusions of law. (Tr., p. 49.)

> These cases coming on to be heard on the defendant's exceptions to the referee's report, the court, after hearing the argument of counsel and being advised in the premises, overrules the defendant's exceptions thereto and confirms said report, and adopts the same as the findings of the court. The distribution of the amount found due, to wit, $13,458.33, as agreed upon by and between the claimants, as stated by the referee in his report, the court adopts.
>
> Upon the facts stated in the referee's report the court, under the act February 13, 1895 (28 Stat. L., 664), and in accordance with the agreement of the parties, decides as conclusions of law as to the said sum of $13,458.33, so found due from the District of Columbia that the several claimants named below each recover judgment against the United States (District of Columbia) in the amounts stated (here follow the names of all the claimants and the several amounts, following the report of the referee). (Tr., pp. 50–66.)

If the judgment is a final judgment under the act of 1895, all pending proceedings were vacated, the appeal should not have been perfected, and the judgment can not be paid.

But if it is a judgment which was suspended on May 28, 1894 (Tr., pp. 28, 48), it is clearly erroneous. I will briefly review the cases of each of the claimants, as presented by their counsel.

The account of Connolly with the District, under the several contracts sued on, is stated by Judge Schofield as the finding of the court on the first trial (Tr., p. 20): A balance is found due the District of $658.05.

Brown et al. v. *District of Columbia* (17 C. Cls. R., 303) was where assignees had brought suits upon claims. The cases were consolidated and, upon hearing, it appeared to the court there were other outstanding cases founded on the transactions of the same assignor, and that he was not a party to any of the proceedings. Upon motion of the defendant, the court ordered that Finley be made a party, and that all the causes be consolidated, so that hearing could be had upon the claims and set-offs pleaded by defendant. It was decided that the act of 1880 conferred on the court ample power to bring matters in controversy in District suits to one trial and final adjudication. Afterwards the cases were heard on the merits (17 C. Cls. R., 402). The set-offs were for improper allowances and payments by the board of audit. They were sustained. The court said:

> The District was indebted to Finley for work on Virginia avenue a balance of $10,965.89. Finley was indebted to the District in the sum of $8,543.18 for money paid to him without consideration and in mistake of facts, and which he had not in equity and good conscience any right to retain.
>
> The claimants appeal to the equity jurisdiction conferred upon the court by the act of

> June 16, 1880, but that is not favorable to their demands. One of the first principles of equity jurisprudence is that he who seeks equity must do equity. To allow Finly to recover from the District without deducting from his claim what he had already received in overpayments and without consideration would be a palpable violation of that fundamental maxim.

This has been the invariable mode of procedure in all these cases in the Court of Claims. The proposition of law has been undeviatingly adhered to (*Barnes* v. *District of Columbia*, 22 C. Cls. R., 366).

It is urged that the set-offs can not be allowed because the statute "made payments to a contractor through this board of audit conclusive." But this court has determined this very matter. (*McElrath* v. *United States*, 102 U. S., 426, 441.) And in *District of Columbia* v. *Cluss* (103 U. S., 900), the court said: "That board (the board of audit) was not a judicial body whose action was final; it exercised little more than the functions of an accountant. A claim allowed by it was not necessarily a valid one; a claim disallowed was not, therefore, illegal."

The section that "no claim shall be prosecuted or considered by the Court of Claims under the provisions of this act which was rejected by the board of audit," is simply an exclusion of such a case from the jurisdiction of the court. (*Brown* v. *District of Columbia*, 127 U. S., 579, 589.)

There was no submission to arbitration of the matters in dispute between the contractor and the

District, nor an award which was conclusive upon the parties. (Tr., p. 33.) The Court of Claims says upon this point:

> There is no dispute as to the amount of work done. The point is that Connolly was allowed board of works rates instead of contract rates in this payment. We do not consider that the referee's report (and we have no other evidence) shows a submission to an arbitration which could produce an award binding and conclusive upon the District, or that the decision of these commissioners effected such a settlement as amounts in law to an accord and satisfaction. On the contrary, this report, in our opinion, simply shows a payment made upon the statement of adjusters appointed in the course of business, prepared upon the assumption that Connolly should be allowed board rates and not contract rates, an assumption held by this court to be unwarranted. (Tr., p. 47.)

Consequently no judgment in favor of Connolly could be given under the statement of the accounts above alluded to (Tr., p. 20); but the overpayments, it is said, were erroneously charged under contract No. 243. We can not go behind the findings. In the first case the court said (Tr., p. 18):

> The original contract, No. 243, stipulates that the price of grading shall be 30 cents a cubic yard, including 200 feet of "haul," and all hauling beyond that 1 cent for every 200 feet. As the work progressed partial measurements and payments were made from time to time at these rates. Subsequently, beginning

with December 5, 1873, are four partial measurements, on which the extra haul was reckoned at 1¼ cents for every 100 feet. This change in reckoning makes a difference in favor of the claimant of $8,413.55. The computation was made by the district auditor or engineer, and the three last payments made through the board of audit.

The change in the rate of payment was doubtless made in pursuance of two orders by the board of public works—reciting them;

and there is no different fact in the findings at the second trial. (Tr., Finding IV, pp. 30–34.)

The only other overpayment charged to the contractor, complained of is under contract 690. The measurement of the work done was upon five blocks; but two of these were designated in the contract. The contractor was paid for all the work at board rates. The court has allowed "board rates" for the work done on the blocks outside of the contract, but has charged Connolly with the excess over contract price paid for work done under the contract. This was at least as favorable to the contractor as he could expect.

EXECUTORS OF SURVIVING PARTNER OF DOWNMAN & GREEN.

I do not deem it necessary to go into the examination of whether these instruments recited in Finding XV (Tr., pp. 42–44) constituted valid assignments of the moneys falling due under contracts Nos. 243 and 1028. If they are established in all the integrity claimed for them, it would be necessary to have an

accounting between Connolly and the assignees before the liability of the debtor could be ascertained. This was not done. And all powers of attorney to Downman & Green were revoked July 9, 1880 (Tr., p. 44). (*Christmas* v. *Russell*, 14 Wall., 69; *Baker* v. *Wood*, 157 U. S., 212.)

But Downman & Green took subject to all equities between the original assignor and the debtor. The court said (Tr., p. 20):

> By a careful comparison of the dates of the papers under which the rights of the claimants in cases Nos. 150, 162, and 280 originated, with the dates of the overpayments, it appears that Connolly during all that time was indebted to the District. It is true that upon a settlement of some of the assigned contracts balances are now found to have been due to Connolly, but these balances could not be assigned so as to escape the set-off of balances then existing on other contracts in favor of the District.

There are other reasons why the representatives of Downman & Green could not recover under these assignments, showing that the original findings were correct. There is nothing in the later findings at variance with these, nor do I see that the rule laid down in the opinion of Judge Davis (Tr., p. 48), when applied to the facts, in the slightest degree sustains the conclusions of the assignees. That learned judge expressly confines the rights of the assignees to the time of notice.

The assignments were under contracts Nos. 243 and 1028. All the overpayments were properly charged,

as we have seen, under contract 243. The court so finds (Tr., pp. 18, 33, 34). Now, if these powers of attorney and agreement set out in Finding XV (Tr., pp. 42–44) were effectual and operative, two things are clear: First, that Downman & Green took subject to the right of the District to set off overpayments made prior to the assignments; second, that, after the assignments, if overpayments were made they were made to them, and therefore their claim is subject to the set-off. So in the settlement of this contract the times of overpayments are immaterial.

But there is a balance of $936.40 due to Connolly or his assignees. This balance is "on contract No. 243 and extensions, with the Hussey assignment" (Tr., p. 20). The work embraced in the Hussey assignment was not done under contract 243 at all. It is not embraced in that contract. It was not considered by Connolly as coming within the Downman & Green papers. It was the subject of another assignment, made to Galt. It amounted to $2,327. Excluding it from the 243 settlement there is nothing left for Downman & Green. A slightly different state of facts exists as to No. 1028, the other contract embraced, presumably, in the power of attorney of May 25, 1875. All the overpayments to Connolly, under contracts Nos. 595, 1037, 665, and 690, which are the subjects of set-off, were made prior to the date of this assignment. The power of attorney and agreements claimed to be this assignment were dated, respectively, May 25 and July 31, 1875. (Tr., p. 43.) The overpayments were made January 27, 1875, February 9,

1875, December 31, 1873. (Tr., p. 20.) Downman & Green took their assignment subject to these amounts as set-offs.

Under the facts, as found by the court, the petition of Downman & Green was properly dismissed. When the motion for a new trial was granted November 13, 1893, this order was made (Tr., p. 27):

> Ordered, That the motions of the claimants for new trials in these cases be allowed under the terms of an order of the court this day filed, which order provides: As to the allegations made by way of counterclaims the affirmative is upon the defendants. Leave is given both parties to take further testimony, which shall be closed January 31, and the case shall be put upon the February trial calendar.

The facts as to the counterclaims were found at the second trial substantially as at the first.

SAMUEL J. RITCHIE.

The assignment to Ritchie was made February 11, 1878, and was from Downman & Green. (Tr., p. 45.) He took what they had and nothing more.

ADMINISTRATRIX OF GALT.

Galt's assignment was dated July 31, 1876. As before noticed, it was for money due for work which was not included in any of Connolly's contracts, but which was done by him and, by agreement of all parties concerned, he was to have credit for. The calculations were based upon board rates. But at the time of this assignment all work had been concluded

upon all the contracts and Connolly was indebted to the District. There was nothing due to Connolly, and Galt took nothing.

Respectfully submitted.

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